

Old Loans: Out of Sight, Out of Mind

Rose Wood, Chief Registrar, Birmingham Museum of Art, introduced the session giving a warning about ignoring old loans as her own institution was suddenly in a situation where there was a need to assess the risk.

The session started with **Andrea Gardner**, Registrar/Assistant Information Officer at Toledo Museum of Art. Toledo's definition of an old loan was any object in their care for which they had some sort of documentation indicating, perhaps, when it arrived, to whom it belonged, or the intended disposition – but without a clear path to resolving the situation.

The most common problems of unresolved loans are:

- Lender moved and did not maintain contact
- Lender died and museum needed to locate heirs
- Staff turnover - loss of institutional memory
- No loan renewal process
- Objects remaining after their initial purpose has been fulfilled
- Lack of staff to deal with the process

Risks

- Lender/heir lawsuit
- Fraudulent claims
- Loss of objects the museum wants
- Staff time and expenses

Benefits to resolving

- Gives ability to adequately insure collection
- Cleans up the records

Andrea recommended a process for cleaning up old loans.

1. start to work on identifying old loans via a physical inventory or using CMS.
2. meet with staff to gather information about the loans (include staff who have left)
3. develop a strategy - work out priorities or easy wins
4. research State's with old loan legislation

Toledo handles old loans in the following way when they have an address

A letter is sent via certified mail with return receipt requested. It includes a description of the object and date of the loan along with a statement noting that if the museum is not contacted to return the object within 45 days, a gift to the museum will be inferred. If the first letter is received but not responded to then another copy of the letter is sent allowing for a total of 90 days to respond. If no response is received a third letter is sent indicating that the museum has now asserted title to the object. In Ohio, the statute of limitations starts from this point. Toledo does not dispose of objects until they are sure they have title.

When there is no address, but a name --

Undertake a 'reasonable search' and document every part of the process so that can prove due diligence. Reasonable search includes probate records, telephone records, real estate tax records, vital (death) records, etc. The goal is to establish if actual notice can be given or whether one must resort to 'Constructive Notice'. In Ohio, Constructive Notice has to be published, for 3 consecutive weeks in the local newspaper, as well as the county

that covers the area of the lender's last known address. Alternative methods are posting on website, local radio announcements or putting up a notice at the local courthouse. The notice should include:

- Name of Lender
- Lender's last known address
- Description of the object
- Date of the loan
- Name of the contact person at the museum
- Notice that the museum is terminating the loan

How to avoid old loans

All signed loan agreements should include a finite period with specific dates. It is also important to have a clause emphasizing that the lender must notify the museum of change of address or ownership. In the case of deposits, temporary custody receipt listing the purpose of the deposit (identification, conservation, purchase consideration, etc.) must be signed and issued. Do not allow drop offs. Try to return unsolicited objects ASAP.

Andrea Perez, an attorney at Kessler Collins, discussed the legal concerns involved in old loans. She recommended that if you can wait to hear back from the lender then do, but you may have to use reasonable judgment. If a standardized policy for documenting loans is developed, that documentation will, if it becomes necessary, allow you to create an affidavit - in writing, signed and notarized -- and will provide evidence to back up your case.

She gave examples of regional laws. In Alabama, the legislation regarding 'property on loan' only applied to State Archives. However, there is a movement to expand this rule to museums. When passed, property on loan with a loan agreement will be deemed donated after the expiration date, written notice given, and no ownership claim within 90 days from the date of the second published notice. Museums will also be able to terminate a loan with an indefinite term after five years have passed. When the loan expires, the department shall make every effort using the last known address of the owner to locate the owner or the owner's heirs. The museum must also document all efforts to locate the Lender. If there is no legal precedence then emphasis is that you must make **every effort** to find owner. This is very different from **reasonable effort** and can be a very strong burden. If you are in Alabama, it will be a good idea to contact Attorney General for advice.

The next example was the British Columbia Heritage Conservation Act. It includes common provisions like 'reasonable attempt', but also requires extended wait periods after notification. See

http://www.bclaws.ca/civix/document/id/complete/statreg/96187_01#section19. The main problem with this legislation is that BC museums usually have to wait 25 years before they can convert the loan and claim title.

The last example is from the UK: Section 12 and 13 of Torts (Interference with Goods) Act 1977 <https://www.legislation.gov.uk/ukpga/1977/32/section/12>. The tort law seems to allow museums in England to sell old loans (if the loan occurred after January 1, 1978) to wit: 'Statutory power to sell uncollected goods', provided the original loan agreement did not prohibit the sale of the object, and if the loan agreement had been terminated either due to written terms of the loan or by notice of termination. In reality, the situation in the UK is more complex, with various other laws that could prevail. As Andrea is working in the UK,

she is not aware of Museums and Galleries using this to sell objects, as it would be seen as 'risky'.

Andrea finished with a list of best practices for loan agreements. In addition to the points outlined by Andrea in Toledo, she recommended that the written loan agreements include:

- the party responsible for insurance
- a clause if lender can't be contacted
- right to photograph the loaned work; and merchandising rights

Adrienne Reid, Vice President at Huntington T. Block Insurance Agency, covered the insurance implications of old loans. She emphasized the importance of having an agreed value, provided by the lender, listed on the loan agreement. This provides certainty in the event of a loss.

If no values are stated, then current market value at the time of loss is used and an independent appraisal is required after the loss. The lender may disagree leading to an arbitration process. Arbitration can lengthen the settlement process considerably. Having an up-to-date value provides certainty, as values over 5 years old are a risk. It is the lender's responsibility to update values of loans. It is also important include a clause on foreign currency fluctuations as claims are paid based on the exchange rate on the date of the settlement. Both parties should be clear of this fact.

Questions raised:

How to deal with a multiple heir situation? If there is a disagreement what can you do about it? If there are multiple heirs then get a letter of offer from each one or confirmation of who should be returned to. Need proof that there was an agreement between all the heirs before returning it or accepting as a gift. Could risk being sued if return to or request permission to acquire or sell from the wrong person, so it is best to wait for legal docs to proceed.

Documentation - is it enough to just keep copies? Advised to go to probate to get official copies, keep documentation in the database in text field and in paper files. In the case of an affidavit there is a reasonable and unreasonable amount of documentation - you can never have too much so protect yourself as much as possible!

What if you find documentation but can't find objects? Rose Wood explained that Birmingham had it as part of its process *not* to contact Lender until the object was physically located in storage and documented fully in the database. There are mysterious disappearances in insurance terms - museum policy this should be covered by this.

There was also a discussion about how to get support and backing to undertake this work. Often long term storage is an issue. It is very important to get the Director involved or curators (especially if they have a good relationships with the lender).

Submitted by Helen Merret, Horniman Museum & Gardens, London